LIBRARY
SUPREME COURT, U. S

Office-Supreme Court, U.S.
FILED
APR 21 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 179

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF IN SUPPORT OF APPELLEES' MOTION TO AFFIRM OR DISMISS

JAMES W. MARKEL
Mairs, Graham & Markel
Post Office Box 999
Winter Park, Florida

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida

STEPHEN MARC SLEPIN
Counsel, State Board of Education
347 Miles Johnson Building
Tallahassee, Florida

ATTORNEYS FOR APPELLEES

INDEX

	Page
TABLE OF AUTHORITIES	ii
PREFATORY STATEMENT	iii
ARGUMENT	
I. The Judgment Below	1
II. The Ground of the Law	4
CONCLUSION	7

TABLE OF CITATIONS

CASES

Page

American Communications Assn. v. Douds, 339 U. S. 382 at 393 1

Baggett v. Bullit, 377 U. S. 360, 380(1964) 2
Bond v. Floyd, 385 U. S. 116, 135(1966) 3
Brown v. BPI of Topeka, 347 U. S. 483, 493 2

Cole v. Richardson and Richardson v. Cole, March 16, 1970, 38 Law Week 3362, 3363 3
Cramp v. BPI, 368 U. S. 278, 287 4
Cramp v. BPI (Fla.1962) 137 So.2d 528 . . . . . 1, 2

Gilmore v. James, 274 F. Supp. 75, 92(1967) 3

Hosack v. Smiley (D.C. Colo. 1967), 276 F. Supp. 876, aff'd 390 U. S. 744(1968) 4

Knight v. Board of Regents of University of State of New York (S.D.N.Y. 1967) 269 F. Supp. 339 at 342, aff'd 390 U. S. 36(1968) 3, 4

Minersville School Dist. v. Gobitis, 310 U. S. 586(1940) 5
Minor v. Happersett, 88 U. S. 165-166 (1875) 6

Shelton v. Tucker, 364 U. S. 479 at 495-496 3
Stewart v. Washington (D.D.C. 1969) 301 F. Supp. 610, 611-612 4

Terminello v. Chicago, 377 U. S. 1, 37 (1949) 2

United States v. Jackson, 390 U. S. 570, 585(1967) 1

W. Vir. State Board of Education v. Barnette, 319 U. S. 624(1943) 5

TABLE OF CITATIONS (con't)

STATUTES

Page

Section 876.05, Florida Statutes 1, 4
Section 876.07, Florida Statutes 4

PUBLICATIONS

Ross, SYMBOLS & CIVILIZATION 5
Weaver, THE ETHICS OF RHETORIC 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1113

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF IN SUPPORT OF APPELLEES' MOTION TO AFFIRM OR DISMISS

PREFATORY STATEMENT

By benign design this brief will be brief and apposite of the law resident in and controlling of the case at bar.

Justice Holmes once mused that: "Sometime the vindication of the obvious is more important than the elucidation of the obscure." And it is in this spirit that this brief addresses itself to:

1. The judgment below,
2. The ground of the law.

Within the context of this presentational scheme appellant's jurisdictional statement will be treated.

I.

THE JUDGMENT BELOW

1. First, the lower Court held the plaintiff-appellant, to be representative of the class of all state employees, to which class the requirement of oath-taking (Section 876.05, Florida Statutes) is indiscriminately applicable. (Opinion pp. 6-7.)

2. Secondly, and foundational to judicial mutation of the statutory oath, the Court held the provisions of the act to be severable. (Opinion p. 8.) The Court cited *United States v. Jackson*, 390 U.S. 570, 585 (1967), and noted the Florida Supreme Court's agreement with the severability doctrine as it related to this very statute. *Cramp v. Board of Public Instruction*, (Fla. 1962) 137 So.2d 528. To which law, and admitting a spate of supporting decisional law, appellant responds with *ipse dixit* that "since it is now clear [to appellant] that not just one, but between three and five of the five operative provisions . . . are unconstitutional," this Court "must" consider the law on the subject *de novo* and the raft of reported cases must be viewed as *tabula rasa*.

Risking ignoration of whatever Pythagorean nexus might, as alleged, obtain as between (a) "three and five of the five operative provisions" and (b) the disvalue of the controlling cases, these appellees urge the said cases as controlling still. (Certainly it would be the most circular of circular arguments to hold the statutory provisions unseverable because "the statute" is unconstitutional, if the unconstitutionality of the statute *in toto* is dependent upon a determination of severability. And to hold the statutory provisions unseverable, despite the case law, because "three" or more provisions strike appellant as unconstitutional would be a coercive *non sequitur*.)[1]

---

[1] See, *American Communications Assn. v. Douds*, 339 U. S. 382 at 393 re. J. Holmes' and J. Reed's derogation of mathematical formulae as criteria of constitutional meaning.

In fine, the statutory oath as upheld below is constituted of two independent, compound clauses each of which is an intelligible compound proposition logically autonomous, however ideologically consonant. (See appellant's brief, pp. 10, 14a-15a)

3. Citing to a raft of decisions invalidating oath provisions exacting declarations of non-membership in certain organizations, the lower Court struck down such exactions as appeared in the subject oath. (Opinion pp. 8-12.)

4. The Court below, in recognition of the psychological datum that belief is a spring to behavior or at least that the two are functionally inextricable, held constitutional the provision, " . . . that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence . . ." (Opinion pp. 12-13.)

The lower Court was not unaware that "As in *Cramp v. Board of Public Instruction* . . . [the Supreme Court does] not question the power of a state to take proper measures safeguarding the public service from disloyal conduct." *Baggett v. Bullit*, 377 U. S. 360, 380, (1964) (Opinion of Clark, J.). For clearly the Bill of Rights has not been converted into a "suicide pact." *Terminello v. Chicago*, 377 U. S. 1, 37 (1949). And with "education . . . perhaps the most important function of state and local governments," *Brown v. Board of Public Education of Topeka*, 347 U. S. 483, 493, a function which is the "principal instrument in awakening the child to cultural values . . ." *Ibid*, the lower Court sustained a mild measure somewhat protective of the community's interest in its posterity. (Opinion pp. 12-13.)[2]

---

[2]See, Weaver, *The Ethics of Rhetoric*, "Dialectic and Rhetoric at Dayton, Tenn." at pp. 36-38, for arguments of Clarence Darrow (in the Leopold & Loeb case) and William Jennings Bryan (in the Scopes trial) testifying to the formidable effects of even subtle educational experiences.

"Indeed, it is plain that a state has a clear interest in assuming '. . . careful and discriminating selection of teachers' by its publicly supported educational institutions. See *Shelton v. Tucker*, 364 U. S. 479, at 495-496 . . . (dissenting opinion of Frankfurter, J.); see also majority opinion at 485 . . ." *Knight v. Board of Regents of University of State of New York*, (S.D.N.Y. 1967) 269 F.Supp. 339, at 342, aff'd. 390 U. S. 36 (1968).

5. Finally, the lower Court found nothing destructive of, nor antithetic to, First or Fourteenth Amendment freedoms by requiring of government employees the taking of an oath in support of the constitutions of the United States and Florida. Indeed this Court has, albeit in dicta, expressly sanctioned state exaction of an oath of support of the Constitution. *Bond v. Floyd*, 385 U. S. 116, 135 (1966).

One of the most succinct and applicable judicial statements on this limited subject issued in *Gilmore v. James*, 374 F. Supp. 75, 92 (1967):

> "Oaths in support of the government are not abhorent to the Constitution. Indeed the Constitution provides one [citing U. S. Const. Art. II, §1]."

To appellant's assertion that the oath's import is unfathomable or dangerously vague, the concerning opinion of Mr. Justice Harlan (joined by Chief Justice Burger) in *Cole v. Richardson* and *Richardson v. Cole* (March 16, 1970) 38 Law Week 3362, 3363, is, we submit, responsive:

> ". . . almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel."
>
> • • •
>
> "I think it can be fairly said that subscribing to the instant oath subjected appellant to no more than an amenity. No First Amendment considerations are, in my view, at all involved in this case. This oath does not

impinge on conscience or belief, except to the extent that oathtaking as such may offend particular individuals . . ."

The District Court in *Hosack v. Smiley*, (D. C. Colo. 1967) 276 F.Supp. 876, aff'd 390 U. S. 744 (1968), treated of alleged vagueness or inhibition of precious historical freedoms by tersely observing that an oath to support the constitutional process does not stagger the understanding of "men of common intelligence," (citing *Cramp v. Board of Public Instruction*, 368 U. S. 278, 287) for it is "plain, straightforward and unequivocal." *at* 878.

Note should be made of two recent decisions rendered in approbation of such oaths: *Knight v. Board of Regents of University of the State of New York* (S.D.N.Y. 1967) 269 F. Supp. 399, aff'd 390 U. S. 36 (1968); *Stewart v. Washington* (D.D.C. 1969) 301 F. Supp. 610, 611-612. Indeed, the oath sanctioned in the *Knight* case, *supra*, required one to pledge to "preserve, protect and defend"—beyond merely supporting —the Constitution. *Knight, supra.*

6. The lower Court, thereupon, upheld such provisions of Section 876.07, Florida Statutes, as are apposite of the valid provisions of the oath prescribed in and by Section 876.05, Florida Statutes. (Opinion pp. 14-15.)

II

THE GROUND OF THE LAW

So far forth it has been argued that the judgment below ought to be affirmed, or the appeal therefrom dismissed, by virtue of the lower Court's consideration of all arguments and warranted disposition of the cause. No legal ground has been left unexplored.

But the ground of the lower Court's judgment or the case law upon which it rested deserves expression.

An appropriate point of departure is Mr. Justice Frankfurter's insightful observation in *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940) [overruled by *W. Vir. State Board of Education v. Barnette*, 319 U. S. 624 (1943)]:

> "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment if fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.' " *at 596.*

There is of this nothing abstruse. "In its simplest definition, a symbol is a conventional sign. A sign represents or signifies: it conveys a meaning. . . . All words are symbols . . . their power is indirect, through their effect on men." Ross, SYMBOLS & CIVILIZATION (1957) 164.

Mr. Justice Frankfurter's observation—with its contemporary referent in the case at bar—is of the first importance. As Professor Ross insists:

> "The bonds of society are the shared symbols, rituals, values, and beliefs of its members, and it is in these that the 'meaning' of the society is contained. . . . Personal freedom yields little of value outside a social order and tradition; it can in fact be guaranteed only in a political and social order, and the value of individual differences, of choice and free intelligence, and the arts and sciences which they nurture, are dependent on shared ritual, symbol and emotion. Our social roots are often forgotten because they are firmly embedded and raise no practical problem. If we forget them overlong, we may uproot them, and with them, ourselves." SYMBOLS & CIVILIZATION, at 172.

In fine, the emotive *sine qua non* of social life is symbolized by such oaths as the one at bar, and appellant did not present to the lower Court evidence of a societal disaffection indicative of such symbols' desuetude. Hence, even as there is no rationale according to which this Court should encourage such a disaffection by denigrating this oath, there is compelling reason for this Court to sanction an existing oath's operation.

Symbols of allegiance are both indicative of social cohesion and, absent massive disaffection, are in turn promotive of its continuation. Chief Justice Waite stated the matter in *Minor v. Happersett*, 88 U. S. 165-166 (1875):

> "The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. . . ."

Though representative of Nineteenth Century formulation, Chief Justice Waite's assertion is not to be doubted as a socio-political proposition of importance. And it is from this matrix that such compelling symbols as the instant oath spring.

CONCLUSION

The judgment of the lower Court is consonant with the decisional law and is reflective of the compelling social realities underlying same. No further argument is warranted.

Therefore, the appellees and intervenor urge this Honorable Court to affirm the judgment below or dismiss the appeal therefrom.

Respectfully submitted,

JAMES W. MARKEL
Mairs, Graham & Markel
Post Office Box 999
Winter Park, Florida

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida

STEPHEN MARC SLEPIN
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida

ATTORNEYS FOR APPELLEES